

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

No. 5:93-CR-00102-F-8

No. 5:12-CV-00368-F

TUVAL McKOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter is before the court on Objections [DE-157] to the Memorandum and Recommendation [DE-156] of United States Magistrate Judge Robert B. Jones, Jr., regarding the Government's Motion to Dismiss [DE-133] Tuval McKoy's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-126], a motion for leave to supplement or amend his § 2255 motion [DE-132], and two supplemental § 2255 motions [DE-149, -153]. For the reasons set forth below, the court ADOPTS the recommendation of the Magistrate Judge to ALLOW the Government's Motion to Dismiss [DE-133] and DENY McKoy's motions [DE-126, -132, -149, -153].

**I. Factual and Procedural Background**

On June 20, 2012, McKoy filed his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE-126]. In his motion, McKoy argues that he is entitled to relief in light of *DePierre v. United States*, 131 S.Ct. 2225 (2011); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); and *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011).

The Government has filed a Motion to Dismiss [DE-133], arguing that dismissal is warranted for the following reasons: (1) The case law does not support McKoy's claims; and (2)

McKoy has failed to demonstrate that he has obtained the necessary authorization from the Fourth Circuit Court of Appeals to allow him to file this his second § 2255 motion. [DE-133] at 3-6.

On May 22, 2015, the Magistrate Judge issued a Memorandum and Recommendation (“M&R”) [DE-156] addressing McKoy’s § 2255 motion and related motions. The Magistrate Judge concluded that McKoy’s § 2255 and supplemental filings were barred as successive under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). [DE-156] at 7. The Magistrate Judge further concluded that the alternative relief McKoy is seeking, pursuant to 28 U.S.C. § 2241, 28 U.S.C. § 1631 and 28 U.S.C. § 2253(c), is unavailable. *Id.* at 9. The Magistrate Judge recommended that the Government’s Motion to Dismiss [DE-133] be ALLOWED and McKoy’s motions [DE-126, -132, -149, -153] be DENIED. *Id.* at 9-10.

McKoy filed Objections [DE-157] to the M&R on June 10, 2015. In his Objections, McKoy raises opposition to the Magistrate Judge’s conclusion as to his claim for relief under *Simmons* and abandons all of his other claims. [DE-157] at 7-8.

## **II. Discussion**

As noted by the Magistrate Judge, McKoy previously filed a § 2255 motion that was resolved on the merits. *See* [DE-123] at 7. Pursuant to 28 U.S.C. § 2244(b)(3)(A), “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Moreover, McKoy sought an order authorizing this court to consider a second or successive application for relief, specifically referring to this case, and his request was denied. *In re: Tuval McKoy*, No. 12-310 [DE-2-1, -4].

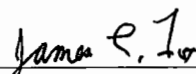
The court notes that the district courts in the Fourth Circuit which have addressed the issue have held that even petitions that raise *Simmons* claims are properly characterized as successive petitions. See *Waters v. United States*, No. 1:01-cr-00048-MR-10, 2013 WL 300826, at \*1 (W.D.N.C. Jan. 25, 2013) (dismissing a successive § 2255 petition raising *Simmons* claims); *Evans v. Warden at FMC Butner*, No. 5:12-HC-2043-FL, 2012 WL 6633942, at \*2 (E.D.N.C. Dec. 20, 2012) (stating that if an action raising a *Simmons* claim were treated as a § 2255 petition, it would be dismissed as successive); *Newman v. United States*, No. 6:04-cr-01127-GRA-8, 2012 WL 6618754, at \*2 (D.S.C. Dec. 19, 2012) (dismissing as unauthorized a successive § 2255 petition raising *Simmons* claims); *Jones v. United States*, No. WDQ-92-0301, 2012 WL 3115756, at \*2 (D.Md. July 25, 2012) (dismissing as unauthorized a successive § 2255 petition raising *Simmons* claims).

### III. Conclusion

For the foregoing reasons, the court ADOPTS the recommendation of the Magistrate Judge as its own, and for the reasons stated therein, the Government's Motion to Dismiss [DE-133] is ALLOWED, and McKoy's motions [DE-126, -132, -149, -153] are DENIED. The court concludes that McKoy has not made the requisite showing to support a certificate of appealability. Therefore, a certificate of appealability is DENIED.

SO ORDERED.

This the 26 day of June, 2015.

  
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James C. Fox  
Senior United States District Judge